90-489

No.

IN THE

Supreme Court of the United States

October Term, 1990

JACK R. DUCKWORTH and
INDIANA ATTORNEY GENERAL

Petitioners,

vs.

WILLIAM E. CRANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court has subject matter jurisdiction over a habeas corpus petition which challenges a fully served and expired 1974 conviction which was used to enhance the sentence resulting from a subsequent conviction. The Seventh Circuit here held that the district court had subject matter jurisdiction because the habeas petitioner was "in custody" within the meaning of 28 U.S.C. §2241(c)(3). This is contrary to the rule announced by this Court in *Maleng v. Cook*, 490 U.S. ____, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) and implemented by the Third, Eighth and Tenth Circuits.

2. Whether the Seventh Circuit's order directing the District Court to "decide whether the 1974 conviction is constitutionally valid" states the proper standard which district courts should apply to habeas review of fully served and expired convictions which have been used to enhance a subsequent sentence. This question was left undecided by this Court in *Maleng v. Cook* and due to the importance of the issue this Court should now resolve this unanswered question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Jack R. Duckworth, the Superintendent of the Indiana State Prison, and the Indiana Attorney General (hereinafter State), respectfully pray that the Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in Cause Number 89-3626 on June 25, 1990 which reversed and remanded this case to the United States District Court for the Northern District of Indiana, South Bend Division (hereinafter District Court).

OPINIONS BELOW

The decision of the Seventh Circuit was issued on June 25, 1990. *Crank v. Duckworth*, 905 F.2d 1090 (7th Cir. 1990). A copy

of that opinion has been included in the Appendix at page A-1. The unpublished decision of the District Court issued on October 11, 1989 can be found in the Appendix at page A-5.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Rule 10 of this Court. The Seventh Circuit's decision was entered on June 25, 1990. This petition is timely filed in that it is filed before the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 13.

STATUTE INVOLVED

28 U.S.C. §2241 provides in relevant part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless-
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depends upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.

STATEMENT OF THE CASE

The Respondent, William E. Crank (hereinafter Crank), is currently incarcerated at the Indiana State Prison as a result of his 1981 state court conviction. This case concerns a challenge to Crank's 1974 expired conviction which was used as a basis for finding that Crank was a habitual offender.

Crank was convicted in 1974 of second degree burglary and was sentenced by an Indiana state court to a term of two to five years, which sentence expired, at the latest, by 1979. No appeal was taken from this conviction. In 1981, Crank was again found guilty of the commission of a crime and this time was also found to be an habitual offender and was sentenced accordingly. The 1974 conviction formed a partial basis for the 1981 habitual offender finding. In a 1986 state court post-conviction relief proceeding, Crank was denied permission to file a belated motion to correct errors for his 1974 conviction, and that denial was upheld by the Indiana Court of Appeals.

This action was initiated on July 15, 1988 when Crank filed his petition for writ of habeas corpus with the District Court. It is undisputed that the petition challenged Crank's 1974 conviction and presented no challenge to Crank's 1981 conviction. The petition was filed on the form suggested in the "Appendix of Forms" section of the Rules Governing Section 2254 Cases In The United States District Courts. In the petition, Crank stated:

> 1. Name and location of court which entered the judgment of conviction under attack
>
> Tippecanoe Superior Court, Criminal Division, Courthouse, Lafayette, Ind. 47902, Kenneth L. Thayer, Presiding Judge.
>
> 2. Date of judgment and conviction
>
> February 22, 1974
>
> 3. Length of sentence
>
> Not less than two nor more than five (2-5 yrs.)

Appendix, page A-10-11. The attachments to the petition continue to emphasize that Crank intended to attack his 1974 conviction. A copy of this petition can be found in the Appendix at page A-10-30.

On October 11, 1989, the District Court found that it lacked subject matter jurisdiction because Crank was not in custody pursuant to his 1974 conviction. The petition was dismissed without prejudice so as to allow Crank to file future petitions raising grounds over which the District Court did have jurisdiction (Appendix, page A-5).

On June 25, 1990, the Seventh Circuit reversed the District Court and directed the District Court to "decide whether the 1974 conviction is constitutionally valid" (Appendix, page A-4).

The questions presented herein are legal in nature. The only issue raised is whether the District Court had subject matter jurisdiction to consider issues raised concerning Crank's fully served and expired 1974 conviction and, if so, whether the Seventh Circuit properly directed the District Court to determine the constitutional validity of said conviction.

REASONS FOR ALLOWANCE OF THE WRIT

1. This case is factually indistinguishable from *Maleng v. Cook*, 490 U.S. ____, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). In both cases, a habeas petitioner sought to challenge a fully served and expired conviction which was used to enhance a subsequent sentence. In *Maleng*, this Court held that, pursuant to 28 U.S.C. §2241(c)(3), such an individual was not "in custody" and therefore the district court lacked subject matter jurisdiction to consider a habeas challenge to that conviction. However, this Court affirmed the appellate court and held that the petition could be read as asserting a challenge to the validity of the subsequent sentence, as enhanced by the allegedly invalid prior conviction. Such a reading would satisfy the "in custody" requirement and provide jurisdiction. Two courts of appeals have adopted this procedure. *See, Gamble v.*

Parsons, 898 F.2d 117 (10th Cir. 1990); *Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142 (3rd Cir. 1989).

The Seventh Circuit held that the simple fact that Crank's subsequent sentence was enhanced by the prior conviction satisfied the "in custody" requirement and provided the District Court with subject matter jurisdiction to determine the constitutional validity of the 1974 conviction. Such a holding is contrary to *Maleng*, the decisions of other courts of appeals and harmful to the rights of both petitioners and respondents in federal habeas proceedings.

2. The District Court herein found that the habeas petition challenged Crank's 1974 conviction and dismissed the petition *without prejudice*. The court's decision to dismiss without prejudice was an intentional act designed to protect the rights and remedies available to all parties. The District Court stated that the dismissal was without prejudice so as to allow Crank to present any grounds that were not foreclosed by *Maleng*. To address any issue concerning the 1974 conviction, *Maleng* required the District Court to read the petition liberally so as to interpret it as a challenge to Crank's 1981 conviction. Had the District Court done so, Rule 9, Rules Governing Section 2254 Cases In The United States District Courts, would bar consideration of any other issues Crank may raise concerning his 1981 conviction in a subsequent habeas corpus petition. This rule provides in relevant part:

> **(b) Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Therefore, converting Crank's petition into a challenge to his 1981 conviction could have prejudiced Crank by foreclosing review of any other issues concerning said conviction. Instead, the District Court dismissed the petition without prejudice so

Crank could file a proper petition raising all issues concerning the validity of his 1981 conviction, including whether the state courts properly utilized Crank's 1974 conviction as a basis for the 1981 habitual offender finding. The Eighth Circuit has adopted such a course of action. In a case with identical facts to this case and *Maleng*, the Eighth Circuit stated:

> This action is dismissed without prejudice to the right of appellant to file a habeas corpus petition alleging the invalidity of his 1986 sentence as a persistent sexual offender, a sentence he claims was imposed, at least in part, on account of the 1982 conviction that he seeks to challenge in the present proceeding. As in *Maleng*, *supra*, the actual petition for habeas relief filed in the present case lists as the conviction under attack only the 1982 conviction, the sentence which has been completely served. It is still open to appellant to challenge his 1986 sentence, and to assert as a ground for that challenge the invalidity of the previous, underlying 1982 conviction.

Taylor v. Armontrout, 877 F.2d 726, 727 (8th Cir. 1989).

The Seventh Circuit has refused to follow *Maleng* and has allowed a direct challenge to the 1974 conviction without requiring the implementation of the liberal interpretation required in *Maleng*. Furthermore, the Seventh Circuit directed the District Court to "decide whether the 1974 conviction is constitutionally valid." The State has been adversely affected by this decision in several ways. In defending habeas petitions, the state which has custody has numerous defenses available, including but not limited to the exhaustion and procedural default doctrines. If, as the Seventh Circuit has held, the instant petition is a challenge to the 1974 conviction, the State could raise defenses to such a petition. In the instant case, there is no doubt that Crank has exhausted his state remedies with regard to the 1974 conviction, but there is some question as to whether the doctrine of procedural default would bar consideration of the issues raised in the habeas petition. The Seventh Circuit has directed the District Court to "decide whether the 1974 conviction is constitutionally valid" (Appen-

dix, page A-4). The Seventh Circuit's decision has deprived the State of its ability to raise procedural defenses which would avoid a review on the merits and this aspect of the decision in and of itself is grounds for reversal.

If, as this Court directed in *Maleng*, the instant petition is properly characterized as a challenge to Crank's 1981 conviction, the State could raise different defenses to that petition. For example, has Crank exhausted his state remedies with regard to the 1981 conviction or has he procedurally defaulted with regard to issues concerning his 1981 conviction? The record is silent as to what defenses the State may have with regard to such a challenge and what defenses the State may have is not relevant. What is relevant is that the Seventh Circuit's holding that Crank may directly challenge his 1974 conviction eliminates many defenses that the State may have if the challenge is directed to the 1981 conviction as required by *Melang* and the State has therefore suffered substantial prejudice. These concerns have been more than adequately addressed in the concurring opinion in *Flittie v. Solem*, 882 F.2d 325 (8th Cir. 1989) (en banc). This opinion is included in the Appendix at page A-31 because of the accurate discussion of the problems created in the aftermath of the *Melang* decision relating to a respondent's ability to raise defenses to a habeas petition.

3. In *Maleng*, this Court concluded by stating that:

> We express no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentence which it was used to enhance.

Maleng v. Cook, 490 U.S. at ____, 109 S.Ct. at 1927. The Seventh Circuit has now ordered the District Court to provide full review of Crank's expired 1974 conviction. The propriety of this order is left unanswered by *Maleng* but is surely contrary to the meaning and intent of *Maleng*. In view of the prejudice suffered by the State as discuss *infra*, this Court should grant certiorari to answer the question unanswered in *Maleng* and to

provide guidance to the lower courts as they confront issues similar to those presented herein.

CONCLUSION

The decision of the Seventh Circuit is contrary to this Court's decision in *Maleng* and the subsequent decisions of other courts of appeals. Furthermore, the implementation of the Seventh Circuit's decision will have an adverse and prejudicial impact on the remedies and defenses available to both habeas petitioners and respondents. For these reasons, it is respectfully urged that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. NOWAK
Deputy Attorney General

Attorneys for Petitioners

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-3626

WILLIAM E. CRANK,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, Warden, and the ATTORNEY GENERAL OF INDIANA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. S88-435—Allen Sharp, *Chief Judge.*

SUBMITTED JUNE 7, 1990—DECIDED JUNE 25, 1990

Before CUMMINGS, COFFEY, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Statutes that impose stiff penalties on habitual offenders give new weight to old convictions. Because custody directly under these old convictions has ended, 28 U.S.C. §2254 does not authorize a petition for a writ of habeas corpus seeking release; you can't be released from a sentence that expired by its own terms. *Maleng v. Cook*, 109 S. Ct. 1923 (1989). Yet the validity of the earlier convictions may determine the propriety of the enhancement of the latest sentence. One way to challenge the prior conviction is through a petition for a writ

of error coram nobis in the rendering court, arguing that the lingering consequences of the conviction (the enhancement of the subsequent sentence) authorizes a new look at the old judgment. See *Lewis v. United States*, No. 89-1762 (7th Cir. May 15, 1990); *United States v. Bush*, 888 F.2d 1145 (7th Cir. 1989). Another is to attack the latest sentence collaterally, on the ground that custody under it violates the Constitution because of the use of an invalid prior sentence. See *United States v. Tucker*, 404 U.S. 443 (1972). *Tucker* holds that "misinformation of constitutional magnitude", *id.* at 447—that is, reliance on an invalid prior conviction—authorizes relief from the current sentence.

William E. Crank maintains that he is in the same position as Tucker: his sentence has been enhanced because of an invalid prior conviction. In 1974 Crank was convicted in an Indiana court of second degree burglary; in 1981 Indiana convicted him of two counts of battery. Crank's sentence on the 1981 conviction was eight years, plus another thirty because of his prior conviction. Crank filed this petition under §2254, arguing that his 1974 conviction is invalid because counsel furnished defective assistance—particularly, did not appeal or secure his consent to forego an appeal. Crank wants the same relief afforded to Tucker: a new sentence uninfluenced by the prior conviction. The difference is that before Tucker filed his petition under §2255, he secured orders nullifying the prior convictions. Crank wants the court with jurisdiction of his current custodian to inquire into the validity of a different court's conviction. The district judge held that *Maleng* prevents that inquiry, because "custody" under a sentence—the foundation for collateral attack under §2254—ends when the sentence ends.

Although the district court did not spell this out, the implication is that Crank's only recourse is to seek a writ of error coram nobis vacating the 1974 conviction and return, writ in hand, to obtain collateral relief from the 1981 conviction on the theory of *Tucker*. Recurring to the jurisdiction that imposed the original penalty is a sound way to proceed. See *Johnson v. Mississippi*, 486 U.S. 578

(1988). Judges need the records that are available in the original forum; lawyers from the original case also may be found there. If Crank's 1974 conviction had been in a court of New York, for example, that state might seek to defend the conviction (perhaps to ensure that it could enhance a later conviction in its own courts), and litigation in which a federal court in Indiana attempts to determine the validity of a New York conviction without the participation of officials from New York would create problems of federalism independent of the "custody" requirement in §2254.

A few days after the district court dismissed Crank's petition, we concluded that a return to the place of the original conviction is not the exclusive way to proceed. *Lowery v. Young*, 887 F.2d 1309 (7th Cir. 1989), holds that a federal court has jurisdiction under §2254 to order a state to resentence a prisoner free of any effect of an earlier conviction in another jurisdiction. (Lowery was a prisoner of Wisconsin; his prior conviction was in Georgia.) We did not decide in *Lowery* whether the federal court could invalidate the prior conviction for all purposes or only for the purpose of the particular sentence then being served, an important distinction if the state rendering the original judgment retains an interest in its validity. It is difficult to see how the original judgment could be set aside for purposes of civil disabilities and sentence enhancements in the rendering state without giving that state notice and an opportunity to defend its handiwork. But that question need not detain us, for both the 1974 judgment and the 1981 judgment were returned in Indiana. Crank's custodian can defend both in the name of Indiana; indeed, the Attorney General of Indiana has been named as a respondent.

Indiana asks us to overrule *Lowery* on the ground that it is inconsistent with *Maleng*. *Maleng* holds that when sentence **A** has expired but has been used to augment sentence **B**, the prisoner is "in custody" only on sentence **B**. The consequences of sentence **A** for sentence **B** do not yield continued "custody" *on sentence* **A**, the Court con-

cluded. *Lowery* holds that a person in custody on sentence **B** may contend that *that* custody violates the Constitution if it was augmented because of an invalid sentence **A**. There is no conflict between these holdings. The "custody" question in *Lowery* is identical to the "custody" question in *Tucker*, which *Maleng* reaffirmed, 109 S. Ct. at 1927. Whether the federal court with jurisdiction over the custodian holding the prisoner on sentence **B** may inquire into the validity of sentence **A** is a matter of comity and the rules of preclusion, not of "custody".

That a person happens to be in custody is of course not a sufficient reason to rummage through old judgments in search of ones that may be invalid. To obtain relief under §2254 the prisoner must show that his *current* confinement violates the Constitution or laws of the United States. That will be so only if the prior judgments not only are invalid but also were used to augment the current one. *Hendrix v. Lynaugh*, 888 F.2d 336 (5th Cir. 1989). Prudence counsels answering the causation question first. *Lowery* holds that the prisoner must establish a "positive and demonstrable nexus between the current custody and the prior conviction", 887 F.2d at 1312, quoting from *Young v. Lynaugh*, 821 F.2d 1133, 1137 (5th Cir. 1987). Such a link may be hard to show when the sentencing judge knows about the prior conviction but does not expressly augment the sentence on account of it. Crank faces no such hurdle. He was sentenced under a recidivist statute to an additional 30 years, time the state could not have imposed but for the 1974 conviction. So the causation requirement has been met. Because Crank is "in custody" on a sentence that may have been enhanced in violation of *Tucker*, the district court must decide whether the 1974 conviction is constitutionally valid.

VACATED AND REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

WILLIAM E. CRANK,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. S 88-435
	)	
JACK R. DUCKWORTH; and	)	
INDIANA ATTORNEY GENERAL,	)	
	)	
Respondents	)	

MEMORANDUM AND ORDER

The court for a second time appointed Candice A. Lichtenfels to represent the petitioner in this case and heard oral argument in South Bend, Indiana on September 26, 1989. Pursuant to the instructions rendered then counsel for the petitioner and for the respondents have filed supplemental memoranda addressed to the applicability of the recent Supreme Court decision of *Melang v. Cook*, ____ U.S. ____, 109 S.Ct. 1923 (1989). This court is especially appreciative of the professional services rendered by appointed counsel for the petitioner.

This court is all too familiar with the proceedings that have taken place in this case. Counsel for the petitioner makes a very appealing argument under the particular facts of this case. The petitioner was convicted in 1974 of burglary and was sentenced to a five-year sentence which expired in 1979. In 1981, the petitioner was convicted of battery for which an eight-year sentence was imposed. Based on the convictions of 1974 and 1979, there was a habitual offender enhancement under the law of Indiana resulting in a sentence of thirty (30) years. The

petitioner is incarcerated in the Indiana State Prison, Michigan City, Indiana.

It is alleged that in 1975, the petitioner first learned that his counsel had never appealed his 1974 conviction. He then began pursuing his statutory remedies, culminating in his filing of the within petition under Title 28 U.S.C. §2254 in July 1988, acting on his own behalf without counsel. In his petition, the petitioner alleges the following grounds for relief:

1) ineffective assistance of counsel;

2) violation of his due process right to appeal; and

3) denial of right to challenge the constitutionality of a conviction for use in a habitual offender proceeding.

In his memorandum supporting the petition, he alleges that he is serving an additional 30 years as a direct result of his 1974 burglary conviction, and was denied the right to challenge the prior convictions relied upon by the State of Indiana to convict him as an habitual offender. He asserted denial of the Due Process Clause and the Equal Protection Clause of the Constitution of the United States and relied on and cited *Moralee v. Thurman*, 326 F.Supp. 677 (E.D.Tex. 1971). Petitioner asserted the unconstitutionality of using his 1974 conviction to enhance his 1981 conviction.

It is beyond any dispute that this court must afford a liberal reading to this *pro se* petition. *Corgain v. Miller*, 708 F.2d 1241, 1251 (7th Cir. 1983). This court is urged to read this petition as a challenge to his 1981 conviction rather than as a challenge to the 1974 conviction. Candor requires this court to state that it would very much like to read this record so as to avoid the direct application of *Melang*. This is a close and difficult case as is readily apparent from an examination of this record. During oral argument, it was suggested that if this court had not vacated its Orders of December 8, 1988, this case would have been finally decided in advance of the Supreme Court's decision in *Melang* on May 15, 1989.

In realistic terms, this case would not under any circumstances have reached the decisional state in the Court of Appeals before May 15, 1989. It is the general obligation of both this court and the Court of Appeals to apply presently controlling law. *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982). *Melang* represents present controlling law. For a most recent application of *Tully*, see *Graham v. Davis*, 880 F.2d 1114 (D.C.Cir. 1989) (applying *City of Canton v. Harris*, ____ U.S. ____, 109 S.Ct. 1197 (1989) to a pending decision).

The court has examined the limited progeny of *Melang* and is influenced by it. In this circuit, *Melang* received a rather brief, passing reference in *Ramsey v. Brannen*, 878 F.2d 995 (7th Cir. 1989), in which Judge Posner held that "custody" for which credit may be given toward service of the sentence did not include time spent in a halfway house before trial as a condition of bail. The Eighth Circuit dealt with *Melang* in *Taylor v. Armantrout*, 877 F.2d 726 (8th Cir. 1989), and squarely applied the in-custody requirement of 28 U.S.C. §2254(a). In that case, the petitioner sought relief from a 1982 state conviction entered upon a guilty plea on the grounds, inter alia, of ineffective assistance on appeal and in his state post-conviction action, of involuntariness of the plea. Petitioner there conceded that his 1982 five-year sentence had been served, but contended that the collateral consequences of that conviction resulted in his receiving an enhanced sentence in a subsequent criminal proceeding. A panel of the Eighth Circuit held that the judgment of the district court dismissing the petition for lack of jurisdiction was affirmed. A similar result was reached in *Waldon v. Kelly*, 880 F.2d 292 (10th Cir. 1989).

Also of interest, particularly in view of the petitioner's argument here is the concurring opinion of three judges of the Eighth Circuit in *Flittie v. Solem*, 882 F.2d 325, 326 (8th Cir. 1989). As this court reads the aforesaid three-judge opinion, it was the view of those three judges that the effect of *Melang*, *supra*, was to deprive that Court of Appeals of subject matter jurisdiction in a context similar to this. If those three judges

are correct, and assuming that this case would have gone forward on the optimum time frame suggested by the petitioner, there would still be a very serious question as to whether the Court of Appeals would have subject matter jurisdiction given the mandates of *Melang, supra*. Obviously, that decision must ultimately be made by the Court of Appeals and not by this court, but the opinion gives some insights into the factors considered.

At the district court level, Judge Bartlett applied *Melang* to dismiss a petition under §2254 for lack of jurisdiction in *Gamble v. Jones*, ____ F.Supp. ____, No. 89-0733-CV-W-9-P (W.D. Mo. Aug. 14, 1989) (Lexis Genfed library, courts file).

As appealing as the petitioner's argument is, this court has very considerable difficulty in finding a principled way to avoid the application of *Melang*. The problem of retroactive application of *Melang* does not appear to have troubled the few other courts that have dealt with its implications. In any event, it is very highly likely that it has been and will be applied retroactively even under the factors in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971). *See also EEOC v. Vucitech*, 842 F.2d 936 (7th Cir. 1988).

Certainly, it is something of a judicial educated guess as to whether the Court of Appeals will apply *Melang* retroactively. Strictly speaking, if *Melang* were to be given only pure prospective application, it would apply only to those cases when a petitioner had been given a subsequent enhanced sentence in a state criminal court *after Melang* was decided on May 15, 1989. That is certainly not the way that it has been applied thus far, and based on that history it is unlikely that it will be applied in the future.

In *Gavin v. Wells*, ____ U.S. ____, 109 S.Ct. 2425 (1989), a memorandum decision two weeks after the decision in *Melang* in which certiorari was granted, a judgment was vacated and the case was remanded to the Court of Appeals for the Sixth Circuit for further consideration in the light of *Melang*. Had

the Supreme Court of the United States intended that *Melang* apply only prospectively, it would not have needed to remand the *Gavin v. Wells, supra*, case.

It has been the desire of this court to enter a final, appealable judgment in this case at the earliest possible time, so that the appellate proceedings can go forward with all deliberate speed. Based on the entire record in this case and the current status of the law, as found in *Melang*, it is the conclusion of this court that there is no subject matter jurisdiction to entertain the present petition under Title 28 U.S.C. §2254. For that reason, this petition is DENIED WITHOUT PREJUDICE. This petition is dismissed without prejudice so the petitioner may present any grounds for relief that are not foreclosed by *Melang*. IT IS SO ORDERED.

DATED: October 11, 1989

CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Lichtenfels
White
Order Book

PETITION UNDER 28 USC §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District NORTHERN DISTRICT
Name WILLIAM E. CRANK	Prisoner No. 5013-2 Docket No. S88-00435

Place of Confinement
INDIANA STATE PRISON
P.O. BOX 41
MICHIGAN CITY, IND. 46360 ALLEN SHARP, J.

Name of Petitioner (include name upon which convicted)		Name of Respondent (authorized person having custody of petitioner)
WILLIAM E. CRANK	v.	JACK R. DUCKWORTH, SUPERINTENDENT INDIANA STATE PRISON

The Attorney General of the State of Indiana:
LINLEY E. PEARSON, OFF. OF ATTORNEY GENERAL
219 State House, Indianapolis, Ind. 46204

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Tippecanoe Superior Court, Criminal Division, Courthouse, Lafayette, Ind. 47902, Kenneth L. Thayer, Presiding Judge.

2. Date of judgment of conviction: February 22, 1974

3. Length of sentence: Not less than two nor more than five (2-5 yrs.)

4. Nature of offense involved (all courts): Conspiracy to commit a felony and Second degree burglary. Crank was convicted of the burglary and acquitted of the conspiracy.

5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____

   _____

6. Kind of trial: (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☒

9. If you did appeal, answer the following:

   (a) Name of court: N/A
(SEE ATTACHED MEMORANDUM)

   (b) Result _____

   (c) Date of result _____

   (d) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Tippecanoe Superior Court, Lafayette, Indiana

(2) Nature of proceeding: Belated Motion To Correct Errors; (PC-2 Petition)

(3) Grounds raised: Ineffective Assistance of Counsel; Violation of Due Process (Denial of Right to Appeal); Denial of Right to Challenge the Constitutionality of the Conviction for use in a Recidivist Proceeding. (Habitual Offender IC 35-50-2-8).

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☒ No ☐

(5) Result: Belated Motion To Correct Errors Denied

(6) Date of result: August 21, 1986

(b) As to any second petition, application or motion give the same information:

(1) Name of court: Court of Appeals of Indiana

(2) Nature of proceeding: Appeal from denial of trial court to allow petitioner/appellant the right to file a Belated Motion to Correct Errors.

(3) Grounds raised: Trial Court's denial of Permission To File a Belated Motion to Correct Errors is Contrary To Law; (See Attached Memorandum)

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☒ No ☐

(5) Result: Denied

(6) Date of result: Decemeber 28, 1987

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: Indiana Supreme Court

(2) Nature of proceeding: Petition To Transfere

(3) Grounds raised: That Court of Appeals erred by Misapplication of Post-Conviction Rule 2, Section 1, in that such application created a Procedural Bar to Crank's Fundamental Appellate Right in violation of the Due Process & Equal Protection Clause of the Federal & State Constitution. (See attached Memorandum)

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☒ No ☐

(5) Result: Denied

(6) Date of result: June 9, 1988 (No. 79A02-8702-CR-00051)

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc.	Yes ☒	No ☐
(2) Second petition, etc.	Yes ☒	No ☐
(3) Third petition, etc.	Yes ☒	No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which your request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes

a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you *should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a ground or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: See "Insert 5A"

Supporting FACTS (tell your story *briefly* without citing cases or law): See "Insert 5A"

B. Ground two: See "Insert 5B"

Supporting FACTS (tell your story *briefly* without citing cases or law): See "Insert 5B"

C. Ground three: See "Insert 5C"

Supporting FACTS (tell your story *briefly* without citing cases or law): See "Insert 5A"

D. Ground four: N/A

Supporting FACTS (tell your story *briefly* without citing cases or law): See "Insert 5A"

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing: Hope Fey, Deputy Public Defender, Att. no. 0008085-29, 309 W. Washington St., Indianapolis, Indiana 46204

(b) At arraignment and plea: N/A

(c) At trial: N/A

(d) At sentencing: N/A

(e) On appeal: Hope Fey, See 15(a)

(f) If any post-conviction proceeding: N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐ N/A

Wherefore, petition prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

_____.
(date)

/s/ William E. Crank
Signature of Petitioner

(Continued from Page 5)

12A. Ground one:

THE DECISION OF THE INDIANA COURT OF APPEALS IS IN ERROR BY DENYING PETITIONER PERMISSION TO FILE A BELATED MOTION TO CORRECT ERRORS, WHERE SAID CONVICTION IS BEING USED AS ONE OF THE UNDERLYING FELONIES TO SUPPORT A CONVICTION AS AN HABITUAL OFFENDER UNDER IC. 35-50-2-8; PETITIONER WAS DENIED HIS RIGHT TO APPEAL (12)(j).

Supporting Facts:

On April 5, 1973, Crank was charged with Conspiracy to commit a felony, a Second-degree Burglary (T.R. 7, 21-23). On February 22, 1974, petitioner was convicted of the Burglary and acquitted of the Conspiracy (T.R. 13, 24-26).

On May 21, 1974, petitioner was sentenced to a term of not less than two (2) nor more than five (5) years (T.R. 16, 27-35). At that time, judge Robert Munno advised petitioner Crank of his Constitutional Right to appeal. When Crank stated to the Court he *did* wish to appeal, his attorney, E. Kent Moore was ordered to file a timely Motion to Correct Errors. *Without* Crank's knowledge, no motion to correct errors was ever filed by counsel Moore. (Crank further stated to the trial court he wished to appeal from the motion to correct errors, if it was denied.)

12B. Ground two:

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL, (12)(i), AND THE DUE PROCESS CLAUSES OF THE FEDERAL AND INDIANA CONSTITUTIONS.

Supporting Facts:

The evidence established beyond a doubt that Crank did not know Attorney E. Kent Moore had failed to perfect the direct appeal, as he was hired to do until after petitioner was tried and convicted as an habitual offender. Because the trial court and the Indiana Court of Appeals has denied petitioner the right to challenge the validity of the prior conviction(s) relied upon to convict him as a habitual offender, Crank's right to Due Process has been denied.

12C. Ground three:

DENIAL OF RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF PRIOR CONVICTION(s) RELIED UPON TO SENTENCE PETITITONER AS AN HABITUAL OFFENDER VIOLATES THE DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Supporting Facts:

Crank is currently serving a 38-year prison term for Assault and for being an Habitual Offender, having been sentenced in 1981. Petitioner first inquired sometime in 1985, whether his prior convictions were subject to attack (R. 76-77). Petitioner is now being denied the right to challenge the constitutional validity of his 1974 conviction. (See Attached Memorandum in support)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

WILLIAM E. CRANK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
JACK R. DUCKWORTH,	)	CAUSE NO. _____
	)	
SUPERINTENDENT,	)	
INDIANA STATE PRISON,	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT

The questions raised in this PETITION FOR WRIT OF HABEAS CORPUS are:

1. (Ground One) Was the decision of the Indiana Court of Appeals in error for denying petitioner permission to file a belated motion to correct errors, as outlined under Indiana Rules of Post Conviction Relief, Post Conviction Rule 2, Section 1, (a) (b) and (c)?

2. (Ground Two) Was petitioner denied Effective Assistance of Counsel as outlined by the Sixth and Fourteenth Amendments to the United States Constitution?

3. (Ground Three) Was petitioner denied the right to Due Process of Law and Equal Protection under the Fifth and Fourteenth Amendments to the United States Constitution, by being denied the right to challenge the Constitutional validity of the prior convictions relied upon to convict him as an Habitual Offender?

FACTS RELEVANT TO ABOVE ISSUES:

Petitioner, William E. Crank was represented by private counselor, E. Kent Moore, at his trial in 1974, for Conspiracy, and Second Degree Burglary (R. 6-7). Crank was convicted of the Burglary and acquitted of the conspiracy (R. 13, 24-25).

Crank was sentenced on May 21, 1974 (R. 16, 27-35). E. Kent Moore continued to represent Crank at sentencing (R. 16, 27-32). After being advised of his right to appeal, Crank requested that a Motion to Correct Errors be filed on his behalf (R. 31). After being advised of his right to appeal, Crank requested that a Motion to Correct Errors be filed on his behalf. (R. 31). Crank also stated he wanted to appeal the denial of the Motion to Correct Errors, if that occured, but he was uncertain whether he could afford to pay for the appeal (R. 32).

The trial judge then noted Moore's obligation to file a timely Motion To Correct Errors, regardless of who paid for it, and directed counselor Moore to file said motion within six days (R. 32). The judge then stated he would ask Moore at the time he ruled on the Motion to Correct Errors, whether Crank had been able to hire a private attorney for his appeal (R. 33-35). However, no Motion to Correct Errors was ever filed by Moore (R. 36-41).

Crank was convicted in 1981 for Assault and being an Habitual Offender. He was sentenced to a term of 8-years for Assault, and to that was added 30-years for being an Habitual Offender. One of the priors relied upon by the trial court was Crank's 1974 conviction under Cause No. CR-5360, in the Tippecanoe Superior Court.

Sometime in 1982, Petitioner's father hired Michael Trueblood, Attorney at Law, to file an appeal on the Assault and Habitual Offender conviction. In 1985, Crank found out from Attorney Trueblood that no appeal had ever been filed on the 1974 Burglary conviction. At this time, Petitioner contacted the Indiana Public Defenders Office, and requested their

assistance in filing the appeal on the 1974 conviction, under Cause No. CR-5360.

Hope Fey, Deputy Public Defender was appointed to file Cranks appeal. On August 21, 1986, Hope Fey filed a Belated Motion to Correct Errors (R. 36-41). That original petition was summarily denied (R. 36), but upon receipt of Crank's Motion to Correct Errors, the trial court reconsidered and set a date for an evidentiary hearing (R. 42).

At the evidentiary hearing on the Motion to Correct Errors, the trial court admitted into evidence the Affidavit of E. Kent Moore (R. 60-61). In Moore's affidavit, he subscribed to the contents of a previous letter explaining that he had received his file on Crank's 1974 Burglary conviction and discovered he was indeed ordered to file a Motion to Correct Errors for Crank, but he was unable to determine why none was ever filed by him (R. 61). Moore noted he had prepared a rough draft of the Motion to Correct Errors he was planning to file (R. 61). (Crank must of had issues for an appeal, and should have been allowed to present them at sometime).

Crank testified at the evidentiary hearing that he had first learned from his public defender in 1985, that no Motion to Correct Errors had ever been filed by Moore (R. 66). The second witness was Michael Trueblood, although Trueblood had represented Crank since 1982 in Post-Conviction proceedings pertaining to Cranks instant conviction (for battery and habitual offender), Trueblood had not considered investigating Crank's previous convictions, including the 1974 Burglary (R. 74-76). Crank had first inquired sometime in 1985, whether his prior convictions were subject to a collateral attack. (R. 76-77).

At the close of the hearing, the trial court took the matter under advisement (R. 91). The Court later denied Crank's request to file a Belated Motion to Correct Errors on his 1974 Burglary conviction (R. 51-52).

Crank then appealed the trial courts denial to the Indiana Court of Appeals, Second District, which essentially held that:

"PC-2 permission was properly denied due to his lack of diligence in pursuring the appeal," (*Crank V. State*, No. 79A02-8702-CR-51; Tippecanoe Superior Cause No. 3723).

On January 18, 1988, Crank filed a timely Petition for Rehearing, which was denied on February 24, 1988. On March 15, 1988, Crank filed a Petition to Transfer and Memorandum In Support of Petition To Transfer To The Indiana Supreme Court. On June 7, 1988, Crank's Petition for Transfer to the Indiana Supreme Court was denied.

ARGUMENT I

The record in this case clearly reveals that from the time Crank first found out no Motion to Correct Errors or appeal was filed by his attorney on his 1974 Burglary conviction, under Tippecanoe Superior Court, Cause No. Cr. 5360, he was more than diligent in requesting permission to file a Belated Motion to Correct Errors, under Post-Conviction Rule 2§1. . . .

Post Conviction Rule 2§1 provides in relevant part:

> "Any defendant convicted after a trial or plea of guilty, may petition the court of conviction for permission to file a belated motion for a new trial, where: (a) no timely and adequate motion to correct errors was filed for the defendant; (b) the failure to file a timely motion to correct errors was not due to the fault of the defendant, and (c) the defendant has been diligent in requesting permission to file a belated motion to correct errors under this rule."

Crank's trial attorney was expressly directed to file a motion to correct errors for Crank, failed to do so, and now, cannot explain why. It is more than obvious that the failure to file a timely Motion to Correct Errors was not Crank's fault.

Petitioner served only one year in prison on the 1974 conviction and was released before any appeal could have been decided. It was not unreasonable for Crank to assume his attorney filed the appeal, since the trial judge ordered it filed. Crank is not an attorney, and only has a grade school education.

For the Indiana Court of Appeals to hold that Crank should be held to the rigid and stringent standards of a licensed trial attorney is mind boggling to say the least. If Crank knew and understood the Indiana Rules of Court, and the Indiana Rules for Post-Conviction Relief, he could have filed his own appeal in 1974. The State of Indiana is placing undue hardships on it's citizens with rulings like this, not to mention the added burdens it is placing on the federal judiciary. The law is clear that no lay person should be required to plead the *niceties of the law.* Indiana has placed Crank in the position of Nient dedire: "To say nothing; to deny nothing; to suffer judgement by default."

In *Macon V. Tash*, (7th Cir. 1972), 458 F.2d 942, no timely motion for a new trial was filed by trial counsel, although the defendant had expressed his desired to appeal. The defendant's petition for permission to file a belated motion for a new trial was denied, and no appeal was taken from that denial. After determining the defendant had sufficiently exhausted his state remedies through a series of pleadings and applications (just as Crank has done) the Seventh Circuit held:

> With due respect for the views of the Indiana Supreme court, we are persuaded that petitioner's federal claim has merit. The Federal Constitution contains no requirement that a defendant be given appellate review of his conviction, but if such review is provided, appellate procedures and their availability to the indigent must satisfy the Fourteenth Amendment's basic standards of fairness. Since the Supreme Court has held that those standards require the states to waive even nominal filing fees, to provide free transcripts, to appoint counsel, and to refuse to dismiss meritless appeals that have not been adequately evaluated by appellate counsel, we believe it is equally clear that petitioner's right to appeal could not be forfeited by the critical error of inexperienced court-appointed counsel disclosed by this record.
>
> (W)e think it falls short of the requirements of due process (sic) for Indiana to foreclose indigents from appealing in a case such as this because of a critical mis-

> take of court-appointed counsel by whom the indigent was represented at his trial. Absent evidence of an intelligent waiver or an appraisal by counsel comparable to that required by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, we believe the state was constitutionally required to protect petitioner's right to appeal, particularly since his motion for an extension of time was filed before the time to appeal had expired, and therefore evidenced a desire to appeal.

Macon v. Lash, *supra*, at 949-50 (footnotes and some citations omitted).

Crank's posture is analogous. Crank clearly evidenced his desire to appeal (R. 31). Crank's attorney was directed to file the motion to correct error and to inform the court whether the appeal would be at public expense (R. 32). The attorney cannot explain his failure to perfect the appeal and in fact found notes in his file indicating what he felt would be the basis for the appeal (R. 61, Exh. A). Accordingly, the denial of Crank's direct appeal deprives him of due process of law and the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

The denial of Crank's appeal also offends concomitant rights preserved in the Constitution of Indiana. Ind. Const. Art. 1, §§12, 13; Art. 7, §§4, 6. Furthermore, Crank notes that Indiana statute has long made the direct appeal from criminal convictions a matter of right. *See* I.C. §35-1-47-1 (Act 1905, Ch. 169, §324, p. 584).

In *Gallagher v. State* (1980), Ind. 410 N.E.2d 1290, the defendant was also present at sentencing with his trial attorney. The attorney filed a Motion for New Trial but took no other steps to perfect Gallagher's appeal. Gallagher's confusion over his attorney's actions was sufficient explanation for his own inaction, and he was deemed diligent under the circumstances. *Id.* at 1292.

Like Gallagher, Crank rightfully believed he had no affirmative obligation for his appeal to be perfected, because his

attorney was directed to handle the matter (R. 33-34). Although Crank was again represented by counsel in 1982, that attorney admittedly failed to seek a belated appeal in the instant case (R. 75). Because it simply had not occurred to the attorney to investigate further, he was obviously in no position to advise Crank that the motion to correct error was never filed in this case (R. 75).

Where "(t)he record in the instant case does not show a voluntary, knowing, and intelligent waiver by petitioner of his right to appeal, but does show evidence of the desire to appeal and lack of advisement about the procedures necessary to perfect the appeal," *Gallagher, supra*, at 1293, permission to appeal is appropriate.

Because Crank was led to believe his appeal was being perfected by counsel and lacked advice about any procedures he, personally, was expected to follow, and because his attorney breached his duty to file the motion to correct error, the trial court's denial of Crank's request to file a belated motion to correct error was contrary to law.

ARGUMENT II

Assistance of counsel for his defense, means "effective assistance", as distinguished from bad faith, sham, mere pretense or want of opportunity for conference and preparation. The Sixth Amendment to our Federal Constitution guarantees an accused in criminal prosecutions, assistance of counsel. Fed. R. Crim. p.44; *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592.

The decision of the Court of Appeals of Indiana is further in error because in affirming the lower court's finding that Crank had not been diligent, the court EFFECTIVELY placed Crank on inquiry notice that his attorney had not properly pursued his direct appeal. However, Crank was entitled to presume his attorney (Moore) had properly pursued the

appeal. The Court of Appeals decision thereby offends the Due Process guarantee that constitutional rights may only be waived upon *actual knowledge* or circumstances requiring diligence, as well as the Due Process guarantee that the waiver of appeal rights must be *knowing, intelligent,* and *voluntary.*

In the alternative, if actual knowledge is not required, (which it is) then the court has affirmed the waiver of Crank's right to appeal in the absence of a clearly announced judicial standard informing Crank how such a waiver could be avoided. See *Gallagher v. State,* (1980), 274 IND. 235, 410 N.E.2d 1290.

Trial counsel failed to file the motion to correct error as ordered. Crank could rightfully presume he would file it as directed. DR6-101(A)(3). Crank was diligent upon learning of counsel's omission. Having afforded him the absolute right to appeal his conviction, Indiana is obligated to protect his appeal from counsel's procedural error.

That was the holding of *Macon v. Lash, supra,* where trial counsel failed to file a timely motion for new trial despite the fact that Macon wanted to appeal. His appeal rights were eventually restored for lack of an intelligent waiver. *Id.* at 949-50.

In *Gallagher, supra,* the defendant also detrimentally relied upon counsel to file his appeal and assumed, like Crank, that the appeal would proceed in due course under counsel's care. In that case, the trial court's denial of permission to file a belated motion to correct error was reversed twelve years after the conviction.

Crank is entitled to the same measure of protection as Macon and Gallagher. *See Hathorn v. Lovorn,* (1982), 457 U.S. 255, 263, and *Wheat v. Thigpen* (5th Cir. 1986), 793 F.2d 621, 625, (due process and equal protection require the law be applied evenhandedly). Further, *Gallagher* expressly recognizes that Crank is entitled to no less protection than those seeking a direct appeal in a timely fashion. *Id.* at 1292; see Ind. Const., Art. 1, §23. For these reasons, too, the denial of Cranks PC2

petition was contrary to law, and the decision of the Court of Appeals must be vacated.

If actual notice is not required, Crank asserts that the denial of his PC2 petition cannot stand because he had no notice of his burden of proof under Post-Conviction Rule 2, Section 1. The cases essentially admit there are no rules and each case turns on it's own facts. *E.g., Collins v. State* (1981), Ind., 420 N.E.2d.880, 881; *Wilhite v. State* (1980), Ind., 402 N.E.2d.1211, 1212. Further, the cases only agree that the burden is on petitioner to prove diligence, *e.g., Collins, supra,* at 881, without defining the standards, and that the denial of permission is reviewable only for abuse of discretion. *Wilhite, supra,* at 1212, *citing Jones v. State* (1979), Ind., 387 N.E.2d.1315. Crank contents this offends the due process requirement that procedural rules be "clearly announced to defendant and counsel." *Henry v. Mississippi* (1965), 379 U.S. 443, 448 n.3; *Wheat v. Thigpin, supra,* at 625.

It is undisputed that the instant conviction was used against Crank in Tippecanoe County recidivist proceedings in 1981. Therefore, due process requires that Crank have a forum for challenging it's constitutionality. *Oyler v. Boles* (1962), 368 U.S. 448. The effect of the decision of the Court of Appeals is to deprive Crank of his forum — the direct appeal process — because of counsel's error, about which Crank had no knowledge and which Crank was in no position to rectify until he learned of it in 1985.

Finally, in this regard, Crank asserts that the presumptions *against* waiver of constitutional rights and in favor of counsel's effectivenss will not permit Post-Conviction Rule 2, Section 1, to operate to Crank's disadvantage under the facts of his case. Instead, once Crank presented a *prima facia* showing his case was entrusted to counsel for appeal, the burden of proof should have been shifted to the State to prove lack of diligence, and the State should have been required to demonstrate how it would be prejudiced if Crank were to have his appeal.

ARGUMENT III

Crank is serving an additional thirty years as a direct result of his 1974 burglary conviction. To deny Crank the right to challenge the prior convictions relied upon by the State to convict him as an habitual offender offends the Due Process and Equal Protection clauses of the FIFTH and FOURTEENTH Amendments to the Federal Constitution. See: *MORALES v. TURMAN*, (D.C. TEX 1971) 326 F.Supp. 677.

> "Persons deprived of their liberty in State institutions have fundamental due process rights of access to the courts to challenge the validity of their confinement and interference with this fundamental federal right will be enjoined by a federal court."

CONCLUSION

For all of the above foregoing reasons, the law and fair play demands that the prayed for Writ of Habeas Corpus issue with instructions to the State of Indiana to allow Crank to file his Belated Motion to Correct Error, and for all other relief proper in the premises.

Respectfully, submitted,

/s/ William E. Crank

William E. Crank
Petitioner pro se
P.O. Box 41-5013
Michigan City, Indiana 46360

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

AFFIRMATION

I, William E. Crank, affirm under the penalties of perjury that I am attesting to and subscribing the foregoing petition for a Writ of Habeas Corpus and Memorandum In Support; that I know the contents thereof; and that all representations are true and correct to the best of my knowledge, belief and understanding.

/s/ William C. Crank #5013
William E. Crank

NOTARIZATION

Sworn to and Subscribed before me, a Notary Public in above said County and State, this 14th day of July 1988.

My commission expires November 13, 1991.

/s/ Eugene C. Brennen
Notary Public & Seal

LaPorte
County of residence

CERTIFICATE OF SERVICE

I, William E. Crank, hereby certify that service of a true and complete copy of the foregoing petition for Writ of Habeas Corpus under 28 U.S.C. §2254 was made upon Linley E. Pearson, Office of Attorney General, 219 State House, Indianapolis, Indiana 46204, by depositing same in the United States Mail, with proper postage affixed, on this ____ day of July, 1988.

/s/ William E. Crank

William E. Crank
Indiana State Prison
P.O. Box 41-5013-2
Michigan City, Indiana 46360

Roger G. FLITTIE, Appellant,

v.

Herman SOLEM, Warden, South Dakota State Penitentiary; Mark Meierhenry, Attorney General, State of South Dakota, Appellees.

No. 87-5365.

United States Court of Appeals,
Eighth Circuit.

Aug. 14, 1989.

Inmate petitioned for writ of habeas corpus, attacking prior conviction which he alleged was used to illegally enhance his habitual criminal conviction. The United States District Court for the District of South Dakota, denied petition, and inmate appealed. The Court of Appeals, en banc, held that petition was essential successive habeas corpus petition which was subject to dismissal.

Affirmed.

Beam, Circuit Judge, filed specially concurring opinion, in which John R. Gibson and Magill, Circuit Judges, joined.

Habeas Corpus 897

Inmate's petition for habeas corpus, in which he essentially attacked prior conviction which he alleged was used to illegally enhance his habitual criminal conviction, was essential successive habeas corpus petition that was subject to dismissal, where Court of Appeals denied same claim previously and that denial was affirmed en banc. Rules Governing §2254 Cases, Rule 9(b), 28 U.S.C.A. foll. §2254.

ORDER

Before LAY, Chief Judge, and McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, MAGILL and BEAM, Circuit Judges.

Roger G. Flittie appeals the denial of his application for writ of habeas corpus. Flittie is presently incarcerated having been sentenced under a habitual criminal statute SDCL 22-7-8. At this time Flittie essentially attacks a prior conviction which he alleges was used to illegally enhance his habitual criminal conviction. This court denied this same claim in 751 F.2d 967 (8th Cir. 1985), and affirmed en banc in 775 F.2d 933 (8th Cir. 1985). Assuming, but without deciding this court has jurisdiction, we find that this second petition is essentially a successive habeas corpus petition and is subject to dismissal under Rules Governing Section 2254 Cases, Rule 9(b), 28 U.S.C. foll. §2254 (1982). The denial of the petition for writ of habeas corpus is affirmed.

WOLLMAN, Circuit Judge, did not participate in this decision.

JOHN R. GIBSON, MAGILL and BEAM, Circuit Judges, concur specially.

BEAM, Circuit Judge, with whom JOHN R. GIBSON and MAGILL, Circuit Judges, join, concurring specially.

I concur in the result reached by the majority. I also agree that Flittie's petition is, indeed, a second or successive application, subject to dismissal under Rule 9(b) of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254 (1982). However, this court has no jurisdiction over the subject matter of this action, a condition precedent to the substantive evaluations contemplated by Rule 9(b).

JURISDICTION

"[A] circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of *a person in*

custody pursuant to the judgement of a state court only on the ground that he is *in custody* in violation of the Constitution or laws or treatises of the United States." 28 U.S.C. §2254(a) (1982) (emphasis added). Thus, Flittie must have been in custody, as such status has been variously defined, with regard to the conviction or sentence under attack in order for subject matter jurisdiction to attach. *Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S.Ct. 1556, 1559, 20 L.Ed.2d 554 (1968). A want of subject matter jurisdiction prohibits a court from considering any substantive aspects of a case or controversy. The Supreme Court as early as *Ex parte McCardle*, 74 (7 Wall.) U.S. 506, 514, 19 L.Ed. 264 (1868) stated "[j]urisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that announcing the fact and dismissing the cause." Indeed, in *McCardle*, the Supreme Court had already heard oral argument in the controversy when the Congress, as it had the power to do, eliminated jurisdiction. This principle has been repeatedly restated. *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 440-41, 105 S.Ct. 2757, 2765-66, 86 L.Ed.2d 340 (1985) (determining that "[t]he Court of Appeals lacked jurisdiction to entertain respondent's appeal and should not have reached the merits"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981) (stating that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction"). *See also First National Bank v. Wright*, 775 F.2d 245, 247 (8th Cir. 1985) (holding that "[b]ecause we have no jurisdiction over this appeal, we may not consider the merits of appellant's argument").

THE ALLEGATIONS

Most of the facts relevant to this matter are set forth in the panel opinion filed in this case, *Flittie v. Solem*, 867 F.2d 1053 (8th Cir. 1989), *vaccated with reh'g granted*, No. 87-5365 (8th Cir. Mar. 21, 1989) and will not be restated. Some matters need to be repeated and additional points set forth for the sake of clarity.

Flittie is presently incarcerated in the South Dakota State Penitentiary pursuant to a 40-year sentence imposed as a result of a 1985 felony conviction. The sentence for the 1985 conviction was enhanced under S.D. Codified Laws Ann. 22-7-8 (1988) because Flittie had been previously convicted of three or more "additional" felonies. He had, in fact, been convicted of four prior serious crimes.

In the amended pleadings upon which this matter was considered in the district court, Flittie pointed out that he needed to attack two of the previous four convictions in order to be successful in reducing his current sentence. His amended petition for habeas relief stated that he was simultaneously attacking a 1980 conviction in federal court (the subject matter of this action) and a 1977 conviction in state court. He alleged that success in both attacks, federal and state, would put him in a position to require the State of South Dakota to reduce his sentence. Specifically, Flittie, in his amended petition, alleged as follows:

> Petitioner is presently in custody at the South Dakota State Penitentiary as a result of a judgment of a felony conviction rendered by the South Dakota Circuit Court, Second Judicial Circuit, Mennehaha County, South Dakota, Case Number Cr 85-144. In that proceeding, the court was advised that Petitioner had four prior felonies, (See Attachment A). In accordance with SDCL 22-7-8, the sentencing court treated Petitioner as an habitual offender resulting in Petitioner being awarded a greatly enhanced sentence. The felonies listed included one felony based upon SDCL 22-37-18, receiving stolen property, a statute which had been repealed two months prior to the Petitioner's conviction on that charge. Correction of this error is presently being obtained in state court (See Attachment B). Consequently, the validity of the judgment which is the *subject of this Petition* becomes extremely critical, since its exclusion will require the *state sentencing court* to reduce the Petitioner's sentence significantly. Clearly the Petitioner is in custody because of

> the judgment of conviction which Petitioner is *herein attacking*.

Amended Petition for Writ of Habeas Corpus at 1-2 (emphasis added). Thus, the petition in this matter clearly points out that Flittie is attacking, in this particular case, a May 15, 1980, conviction for being an accessory after-the-fact to murder. Notwithstanding that the 1980 conviction had been fully served, Flittie contended in the district court, and in this appeal, that he met the custody requirement of 28 U.S.C. 2254(a) because of the collateral (enhancing) consequences of the 1980 conviction. In spite of the issues alleged and framed in the district court and on appeal, the majority has assumed, presumably, in order to deal with the substance of the claims under Rule 9(b), that Flittie is attacking in this case his present (1985) sentence.[1] Such an analysis is unsupported by the pleadings or the issues as otherwise framed by the parties. Such analysis is also undermined by the action taken by the majority.

There is no dispute that Flittie has long since fully served the 1980 sentence and has fully discharged all obligations imposed as a result of his 1980 conviction. Therefore, this case is controlled by the May 15, 1989, holding of the Supreme Court in *Maleng v. Cook*, ____ U.S. ____, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). In *Maleng*, as here, the petitioner sought to attack a conviction for which the sentence was fully served. He sought to establish, as in this case, subject matter jurisdiction as to the fully served crime by pointing out the enhancing (collateral) effect the crime had upon a sentence imposed for a later conviction, which later sentence Maleng was currently serving. The Supreme Court rejected the argument that the collateral (enhancing) consequences of the earlier crime established subject matter jurisdiction under the habeas statute. *Maleng*, 109

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[1] The majority order states, "Assuming, but without deciding this court has jurisdiction, we find * * *." Such a statement is, to say the least, mystifying. The court either has jurisdiction or it does not have jurisdiction. And, this question must be answered at the outset in the federal courts.

S.Ct. at 1926. The Supreme Court did find, as does the majority here, subject matter jurisdiction through a deferential reading of the pleadings, stating that the habeas petition "can be read as asserting a challenge to the 1978 [current] sentences, as enhanced by the allegedly invalid prior [fully served] conviction." *Id.* at 1927 (citation omitted). Whatever the petition stated in *Maleng*, the same cannot be said for the issues framed by the pleadings in this case. And, in my view, the holding in *Maleng* must be narrowly construed in order to avoid, in this type of case, a clash with other, well established, rules of procedures in habeas cases.[2]

In this case, the habeas petition alleges that a successful *future* attack upon the 1985 conviction may result from the vitiation of both the 1977 conviction and the 1980 conviction. Otherwise, the 40-year sentence remains within the statutory guidelines established for three or more prior offenses. The

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[2] Post-*Maleng* holdings which state, or infer, as in this particular case, that subject matter jurisdiction will automatically lie upon the simple allegation that current custody is improper because of the enhancing effect of a fully served sentence are erroneous, or, at least, misleading. While exhaustion is not a jurisdictional requirement, *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 2062, 80 L.Ed.2d 674 (1984), subject matter jurisdiction must be established through proper pleadings, according to the nature of the case. *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir.1976). Therefore, assumption of jurisdiction upon the bare allegation that a previous conviction enhances a current sentence, without consideration of potential procedural bars apparent from the pleadings, improperly broadens the holding in *Maleng*. I have no objection to the majority assuming jurisdiction upon a legitimate attack on the 1985 sentence, at least for the limited purpose of considering the issues of exhaustion of state court remedies and the potential existence of an adequate independent state procedural bar. Such was not done here. Consideration of these matters would clearly establish that the 1985 conviction was not properly before the district court, or the panel or this court en banc. Once it is established that the attack upon the 1985 sentence is procedurally barred, as clearly shown by the pleadings and the record, this court has no subject matter jurisdiction to further consider the 1980 conviction and the petition should be dismissed on that basis and not under Rule 9(b).

petition makes no substantive allegations whatsoever that the 1985 sentence is currently under attack.

The only reference in the record to the 1985 sentence deals with the manner in which the sentence was enhanced by the 1977 and 1980 convictions. There is no allegation in the pleadings or showing in the record that a previous attack, based upon federal rights, has ever been made in state or federal court with regard to the 1985 sentence. Thus, if, as the majority infers, the court has subject matter jurisdiction because Flittie has mounted an attack upon his 1985 sentence, the petition is not a successive habeas petition subject to dismissal under Rule 9(b), it is an initial petition concerning the 1985 sentence. The claim raised and denied in 751 F.2d 967 (8th Cir.), *aff'd en banc*, 775 F.2d 933 (1985), *cert. denied*, 475 U.S. 1025, 106 S.Ct. 1223, 89 L.Ed.2d 333 (1986); and referred to by the majority in support of its Rule 9(b) action, involved only the 1980 conviction, not the 1985 sentence.

The end reached by the majority follows a convoluted pathway through a newly imposed and previously unassaulted 1985 sentence to a Rule 9(b) dismissal of a formerly litigated 1980 claim. And, in making the Rule 9(b) dismissal, nary a word is said about the 1985 sentence, upon which jurisdiction must stand in order for the majority to dismiss the 1980 conviction as a successive request. The majority order is not supported by *Maleng* and will cause confusion for those litigants who attempt to analyze the requirements of state court exhaustion, *Maleng*, *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), *Engle v. Isacc*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) and this case.

CONCLUSION

The only matter under attack in this habeas proceeding is the 1980 conviction. The pleadings, the evidence, the briefs and the *majority order* establish such a conclusion. The matter should have been dismissed for a want of subject matter jurisdiction.